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AUTHOR	Thomas, Alan M.
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ABSTRACT

Fourth in a series of publications addressing the legal implications of continuing education in Canada, this paper deals with school liability in accident cases and how that liability might change with an increase in adult students. Canadian school accident liability cases have traditionally evolved around the "careful parent" doctrine in which the teacher and school board are expected to take the same care to prevent accidents as would a careful parent. More relevant to a system of continuing education might be the doctrine of "occupier's liability" that demands that the teacher and school board should not be guilty of negligence in guarding against unusual danger. Also relevant, although not widely used, may be the new concept of "individual supervision" that holds that a supervisor ought to be even more knowledgeable than a careful parent about the possible dangers inherent in certain activities like gymnastics or the use of power tools. Both types of school liability cases, those involving organized school activities or unorganized activities, depend heavily on seven factors: age of the student, nature of the activity, amount of instruction the student received, the student's awareness, approved general practice, foreseeable risk of danger, and previous accidents in similar circumstances. (Author/JM)

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ACCIDENTS WILL HAPPEN:

AN INQUIRY INTO THE LEGAL LIABILITY OF TEACHERS AND SCHOOL BOARDS

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Fourth Publication in the Series

THE INTERACTION OF LAW AND EDUCATION

ALAN M. THOMAS

DEPARTMENT OF ADULT EDUCATION
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FOREWORD

The initial impetus for these series of publications was our curiosity regarding the legal implications of the gradual growth of a genuine system of continuing education in Ontario and Canada. Our assumption was that the major intersection of law and education to be found principally in what is known as "school law" would reflect the fact that the beneficiaries of the system as it existed were "minors" in the eyes of the law in general. Our question was what would be the results when that fact was no longer the case?

None of our studies to date seems to be so clearly affected by changes in the ages of the participants as the study contained in this pamphlet. Mr. Phillips' descriptive analysis and summaries make it perfectly clear that the decisions in Canadian courts in this area of the law, which are the pivots of the evolving legal structure, reflect the ages of the students, and that in this evolution related to the future rights of both older students and teachers, there remains a number of unresolved problems.

At first glance the issues would seem to be determined by decisions related to the duty of supervision of the young as contained in the doctrine of the "careful parent" and the less demanding "occupier's liability" which, of course, extends far beyond the circumstances of being a student in an educational setting. It would appear that the "careful parent" doctrine is clearly inappropriate in the case of

students of mature ages, yet in the case of James vs. River East School Division No. 9 this doctrine was applied, although the student in question was a girl of eighteen years. An even earlier decision in Canada (Butterworth vs. Collegiate Institute Board of Ottawa) had found in an athletics accident that boys of fourteen "are capable of and indeed should be held to exercise reasonable intelligence and care for their own safety". While in general, as Mr. Phillips points out, the standards of care relax as the age of the students in question increases, nevertheless the law does not seem entirely consistent as to exactly what a reasonable standard of care on whose part may be.

An example of an alternative basis for redress to that to be found either on the grounds of the doctrine of the "careful parent" or on the grounds of "occupier's liability" can be found in a new concept of "individual supervision" which appeared in arguments related to the case of McKay vs. Board of Govan School Unit No. 29 where it was argued that advanced knowledge of some kind involved the holder of such knowledge in a greater supervisory responsibility than is the case in other situations, and that this responsibility was more specific than that to be found in the doctrine of the "careful parent". While the judgement was overturned upon appeal, the decisions as reported in this study suggest that under different circumstances such a principle might be allowed to stand and thus provide for relief when "occupier's liability" would not. While it is clear that the application of the principle of "inherent danger" must be affected by the age and experience of the student in question, never-

theless, the special circumstances affecting the learner of any age who enters a situation never experienced previously, clearly require more analysis with a view to protection and liability than seem to be afforded at present.

It is of equal importance that the protection of the teacher in such situations as exist with older students be reexamined. However the doctrine of "approved general practice" in which some teachers have sought and found protection seems to run counter to the nature of the educational enterprise which implies the need for experimentation. In such experimental situations by means of which education itself evolves, the teacher's behaviour is by definition unlikely to be either general or approved in the sense of widely accepted.

This brings us to a conflict between the law and education or, more properly, learning, of a deeper and more fundamental nature. Education is by nature an historical undertaking which cannot be repeated, erased, or entirely anticipated. When one person, and this phenomenon is so much more cogent in the case of adult learners, learns something that he or she has not known before, then not only is he or she transformed in a way impossible to predict, but so is the subject matter learned and the entire world. The law, resting as it must on precedent, and assuming regular behaviour, must find itself at odds with the nature of education. We must look further for the emergence of law related to definable and agreed upon "learning situations", where the specific behaviour is given

some latitude not available in other situations. In the past, as Mr. Phillips points out, the law has been able to provide special lattitude on the basis of age and dependence which up until now has defined most learning situations. Since this is no longer the case we shall have to turn to other indicators of discrimination. Associated with the early universities was the notion of "sanctuary" where behaviour was subject to special rules and courts. Perhaps we need to reexamine the function of that doctrine in order to deal fairly and justly with our own emerging learning system.

This is the fourth of the pamphlets in this series. The main work in this case has been completed by Mr. David Phillips with some assistance from Mr. John Stockwell, senior assistant on the project, and Miss Isabel Brown. In this case, time did not permit the exposure of the initial draft to a seminar, a lack which the group very much regretted. We hope, however, that as it is, this document will stimulate comment and discussion so as to fulfill the overall intentions of the series. With nearly half the adult population in Ontario engaged in some form of further education, legal issues arising out of such behaviour must attract growing attention.

INTRODUCTION

Wherever masses of children congregate - running, shouting, scuffling - accidents are sure to happen. And nowhere do more children congregate for longer periods of time than at school. Accidents and their resulting injuries during organized school activities or outside in the school playground are a constant peril at every school. If an accident does occur, the teacher and the school board may possibly be held liable.

Recently, the Supreme Court of British Columbia awarded more than one and one-half million dollars to a student who was gravely injured during a physical education class.(1) Both the teacher and the school board were found to be negligent by the Court. The implications of this case for teachers and school boards are potentially far-reaching. Not only are the financial stakes of negligent behavior greatly increased, but now there is a greater incentive for parents whose children have been injured at school to risk the high cost of litigation in the hope of obtaining a large compensation award.

Faced with this prospect of more litigation involving teachers and school boards, it is a proper time to examine past decisions in the area of the law and to try to find answers to some of the pressing questions about liability. Just when will a teacher be found negligent if a pupil is injured? When will a school board be found negligent, and why? On what basis will a court determine that negligence has occurred? These are timely questions for all teachers and administrators who bear the responsibility of supervising and directing students and school grounds.

This paper will proceed by way of a general survey of important concepts in tort law, followed by a discussion of the 'duty of supervision' and occupiers' liability. The cases will then be reviewed and conclusions drawn from them. Finally, new developments and possible directions in the law of negligence affecting students and school boards will be discussed.

THE GENERAL PRINCIPLES

Tort

The word 'tort' is derived from the Latin tortu meaning crooked or twisted. The concept, tort, has been present in English law for centuries. Generally speaking, a 'tort' is a wrong committed by one person against another. The body of law which has grown up around the concept of tort (known, not surprisingly, as tort law) is concerned with wrongdoers and victims - and the eventual compensation of a victim by the wrongdoer for any and all damage or injury he has caused.(2)

The word 'tort' however, does not designate a particular wrong. Rather, it is a generic term used to designate a body of wrongs. Consequently, while a person may be said to have sued another 'in tort', his claim must find a more particular basis. Some examples of the specific types of wrongs which may support a court action are: assault, battery, negligence, misrepresentation, and defamation.

When examining the liability of teachers and school boards in tort law, two specific areas become the focus of attention: (a) negligence, and (b) occupiers' liability. These two aspects of tort doctrine are the common supports upon which any suit against a teacher or school board

is built. A basic understanding of the principles of negligence law, especially, is an important first step before examining the crucial concept of the 'duty of supervision'.

Negligence

Negligence is the most important facet of tort law today. This is due primarily to the extensive automobile litigation clogging our courts. In these cases the presence or absence of negligence is constantly in issue. 'Negligence', however, is all-pervasive. The word, itself, describes a manner of human behavior. Wherever an activity occurs, there exists the possibility that the activity will be performed negligently with resulting damage or injury. The fascinating feature of this tort is that despite its all-pervasiveness, its substance may be broken down into a limited number of elements that do not vary with the context.

The five elements of the tort of negligence are as follows:

(1) A duty of care, recognized by law, existing between two persons.

(2) A standard of care, inhering in the duty, to which each person is expected to conform in relation to the other. When a person, who owes to another a duty under the law, fails to act according to the required standard of care, that person has been negligent.

(3) Injury or damage resulting to the plaintiff.

(4) A reasonably direct connection between the defendant's

conduct and the resulting injury. This is usually termed the issue of 'remoteness of damage' or 'proximate cause'.

(5) The absence of negligent conduct by the injured party. In other words, the court will ask itself whether or not the defendant was in some way negligent such that he contributed to or partly caused his own injury.[3]

In the cases discussed below, it will be seen how the courts keep these elements constantly in mind and weigh them, either implicitly or explicitly, when formulating a decision.

The Duty of Supervision

The duty which is commonly owed to students at a school is known as the 'duty of supervision'. This duty is placed by the courts upon the persons in a school who find themselves in a supervisory relationship with a student. Usually, this person is a teacher, sometimes, it is the principal of the school, and, occasionally, it is the school board itself.

The standard of care which defines how this duty is to be exercised is known as the 'careful parent' test. The authority for this test is drawn from a classic English decision dating from 1893. Williams v. Eady[4] concerned a situation where a student was injured when a bottle of phosphorus exploded. The evidence disclosed that the headmaster had left the bottle in such a place that the boys could easily get access to it. In his decision, Lord Esher remarked:

"...the schoolmaster was bound to take such care

> of his boys as a careful father would take care of his boys, and there could not be a better definition of the duty of a schoolmaster. Then he was bound to take notice of the ordinary nature of young boys, their tendency to do mischievous acts, and their propensity to meddle with anything that came in their way." (5)

Williams v. Eady is frequently cited in Canadian cases dealing with injuries to students while at school and it is the source from which much of our law in this area has developed. Yet, although the 'careful parent' test seems a simple principle at first glance, several problems arise whenever an attempt is made to apply it.

Generally, it is simply not sufficient to test a teacher's or a principal's actions with the question, "Would a careful parent have acted the same way in an identical situation?" A situation involving a school accident will rarely, if ever, have an identical equivalent in a family setting. A teacher is usually responsible for supervising thirty or more students at one time. Very few parents have thirty or more children. The problem, therefore, is that the nature of supervision varies with the circumstances. The person who is supervising; the person who is being supervised; the number being supervised; and the activity being engaged in; all are factors which affect the nature of the supervision. The question to consider is whether or not the careful parent test could or should apply to all kinds of supervision no matter what the circumstances.

Another problem arises whenever there is a question as to whether or not a duty of supervision actually existed in a given situation. The duty must have limits, but what are they, and how are they determined?

Both these problems can be dealt with by attempting to conceptualize the 'duty of supervision' in terms of three dimensions. The first dimension is time - at what point in time does the duty of supervision begin and cease? The second dimension is space. Over what area must the duty be exercised? Could a teacher be held liable for injury to a student off school property? The third dimension is extent, degree of supervision required. This relates to the first problem - that of the varying nature of supervision depending upon the circumstances.

These three dimensions, therefore, provide a convenient framework within which to examine the duty of supervision. It is important, at the same time, not to lose sight of the more general approach that a judge will follow in these cases. Ultimately, negligence is determined by a judgment of what was reasonable in a particular set of circumstances. The judge tries to get inside the mind of the reasonable man. He assumes that this mind is a 'reasonable' mind - not necessarily a perfect mind, but not a stupid one either. He tries to determine what that mind should have been aware of in the situation and then measures the defendant's behaviour by this standard. Finally, he tries to determine whether the consequences which occurred should have been foreseen as being (a) likely or probable, (b) a possibility, or (c) a slight possibility, in the particular circumstances.

This concern with reasonableness and foreseeability is a constant theme throughout the cases. The effect of the 'careful parent' test is to raise the level of foreseeability at which a teacher or other

person would be expected to take avertive action. In other words, whereas a person under a general duty of care may not be negligent where injury occurred in circumstances in which it could be foreseen as a possibility, a teacher, as 'careful parent' may be expected to foresee and guard against slight possibilities of danger. The standard of the 'careful parent', therefore, can be very stringent and it places a teacher on his guard in all situations. Still, a teacher cannot be expected to perform superhuman tasks and for this reason even in his role as 'careful parent' he will not be held responsible for every injury which occurs to a pupil under his supervision.

The Negligence of School Boards - Occupiers Liability and Vicarious Liability

When considering the liability of a school board to injured students, it is necessary to make the distinction between liability based on fault and vicarious liability.

"We speak of vicarious liability when the law holds one person responsible for the misconduct of another, although he is himself free from personal blameworthiness or fault".(6) Thus, Fleming describes the concept of vicarious liability with his customary clarity.

The most common application of vicarious liability is found in the law of master and servant. A 'master' can be found liable, through no fault of his own, for wrongs committed by a 'servant' provided that the servant was acting in the course of his employment

at the time. The law of master and servant, today, applies generally to employer-employee relationships.

Thus, on the basis of vicarious liability, whenever a teacher commits a breach of the duty of supervision, the school board is drawn into the action. From the injured plaintiff's point of view, this is crucial to the eventual success of his claim. If he suceeds in obtaining a large award, his only hope of recovery is against a school board with the financial resources to satisfy the judgment debt. It is fair to say that this doctrine is the sine qua non of much litigation arising from injuries to students on school premises.

Vicarious liability, then, is a type of indirect liability sustained by a school board through no fault of its own. There are other situations, however, where a school board may be found at fault and held directly liable for some injury or damage. The usual basis for this type of claim is found in an area of law known as 'occupier's liability'.

The law has recognized that in certain circumstances an occupier of land may owe a duty to persons entering upon that land. 'Occupier' in this sense refers to the person who has immediate control over the land. Usually, this will be the owner of the land, but it may also be a lessee or a licensee.

The standard of care inhering in an occupier's duty varies depending upon the type of entrant. There are generally four categories of persons who may enter upon the lands of another. First, there are those who enter as of contractual right, such as ticketholders to a

hockey game or concert. The occupier must show them sufficient care to make the premises as safe from all dangers as is reasonably possible. Secondly, there are those who enter by invitation of the occupier and who confer a material advantage upon him. This category includes such persons as the milkman or the postman. These are known as 'invitees'. Thirdly, there are the 'licensees' - persons who enter by permission of the occupier, but who do not confer any material advantage upon him. Finally, there are the trespassers who are present on the land without any permission at all.

The task of classifying the entrant is extremely important since the standard of care differs depending upon the entrant. Generally, students have been considered as invitees upon school property. A classic statement of the standard of care owed to invitees is contained in the case of Indermaur v. Dames.

> Willes J.: "We consider it settled law that [the invitee], using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as a matter of fact." (7)

Consequently, school boards are under a duty to their students to warn of concealed or unusual dangers located on school property. Similarly, school boards should clear away or keep locked up any articles which might be considered inherently dangerous. School boards, however, are under no duty with respect to dangers which are obvious

or should be obvious to the eyes of a student. It is because of this latter consideration that an issue has arisen in some cases as to whether or not there is, in fact, a higher standard of care required of school boards with respect to school property.

THE CASES

The Two Fact Categories

For the purpose of analysis, the cases to be discussed in this paper have been divided into two principal fact categories. The first of these concerns cases involving situations which arose in the course of organized school activities, usually as part of the school curriculum. Many of the incidents occurred during physical education classes. However, the cases are by no means restricted to that type of situation as the following discussion will make clear.

The second major fact category concerns those cases which involve injuries arising from spontaneous or unorganized activity on school grounds. These injuries usually occur on the playground, before or after school, or during recess. Often, the question of who, in fact, is the supervising authority is blurred. It may be a particular teacher, a school principal, or the school board directly. Sometimes, the question of 'supervision' never arises. In those cases, the court generally centers its attention on the issue of occupier's liability and the board's common law and statutory duty in relation to its own premises.

The approach taken in analyzing these two fact categories is basically historical and developmental. The cases are discussed in

chronological order leading up to the present day. In this way, it is possible to see how doctrines and interpretations are developed, refined and then, occasionally, discarded.

On another level, the analysis is concerned with isolating specific factors or considerations in the mind of the court that determine the outcome of the decision. By listing these factors, and exploring their interrelationships, it may be possible to develop a general analytic approach to all situations involving teacher or school board negligence. This in turn could be used as a guide for teachers, principals and school boards who wish to know what is expected of them under the law. Furthermore, if a situation does arise where a suit is threatened, the general analysis could be used to anticipate the argument which might be advanced for either side as well as offering some means of predicting the outcome.

The Curriculum Cases

An early reported case in Canada bears a remarkable resemblance on its facts to the British leading case of Williams v. Eady. In Duncan v. Ladysmith School Trustees (8) the plaintiff was injured as the result of an explosion caused by some students playing with chemicals. The evidence indicated that these chemicals had not been locked away in a safe place by the teacher when he went to lunch. In his judgment, Macdonald C.J.B.C. implied that on the facts the teacher was negligent. However, this determination was unnecessary because the plaintiff's action was barred by a limitation provision in a statute restricting the time period within which an action may be instituted.

Boxhorses, in gymnastics classes, for some reason, have been the source of much important litigation in both Canada and Britain. The first Canadian boxhorse case was Butterworth v. Collegiate Institute Board of Ottawa.(9) Butterworth, a boy of fourteen years old, seriously injured his elbow while vaulting a horse. At the time of the accident, the teacher was not present, and some senior boys assigned to supervise the activity were busy elsewhere. In addition, the court determined that the plaintiff had received only one period of instruction on the boxhorse and he knew that he was clumsy at the activity. The judge concluded that, if there was negligence on the part of the defendants, it at least was not a proximate cause of the accident. He rested his decision heavily upon his opinion of the awareness of the plaintiff at the time of the accident:

> "I am of the opinion that boys of 14 years of age are capable of and indeed should be held to exercise reasonable intelligence and care for their own safety. With great respect, I am further of the opinion that paternalism in respect of boys of teen age in collegiate institutes should not be extended to a degree which would virtually deprive them of that exercise of intelligence demanded of young people of that age in other walks of life." (10)

Consequently, the age of the plaintiff was an important factor in determining whether or not there had been a breach of the duty of supervision. 'Age', then, can be isolated as one factor which limits the scope of the duty of supervision.

In Ramsden v. Hamilton Board of Education,(11) a sixteen-

year old boy was seriously injured when a chisel he was holding during a manual training class came in contact with a revolving sanding wheel and was driven down into his leg. After reviewing the evidence, the court concluded that the injury was solely the fault of the plaintiff who had assumed the risk when he began "flicking" his chisel near the machine. The court concluded that in the circumstances the supervision of the activity had been adequate and that:

> "human prudence would be taxed beyond reason, were it to endeavour to foresee every possibility of human ingenuity, or boyish mischievousness, in its search for opportunities to get into trouble, in even the remotest and most unlikely corners, nooks or crannies." (12)

Once again, the age of the plaintiff was a decisive factor against his claim. In effect, he was old enough to know better.

That it is not easy to recover against a school board is illustrated by another case where the injured student was a child of relatively tender years. In Murray v. Belleville Board of Education,(13) a twelve-year old boy broke his wrist during an exercise in which several boys made a human pyramid. The judge found on the evidence that the infant plaintiff had been reasonably trained and coached in the performance of the exercise, that the exercise was not unreasonable, that the infant plaintiff participated voluntarily, and that he was mentally alert and physically fit to take part. The judge found no negligence on the part of the supervising teacher.

The Murray case is useful because it indicates some factors

which a court may consider in the course of reaching a decision. For instance, the court will assess the level and amount of instruction received in the activity, as well as the ability of the student to perceive and cope with the risk. Also, the court will ask itself whether there was, in fact, some supervision. It is clear, from the Murray case, that a teacher will not be held liable merely for conducting an activity which contained an element of danger.

An interesting application of some of these factors is found in the case of Gard v. Board of School Trustees of Duncan.(14) Here, an eleven-year old boy received a serious eye injury when he was struck with a stick during a grass hockey game. The teacher in charge had given her permission for the children to play, despite the fact that the students had been given very little instruction in the sport, and she was otherwise engaged at the time in a staff meeting. Thus, in contrast to the Murray case, there was absolutely no supervision of the activity at the time the accident occurred. Also, instruction in the game had not been sufficient so that the children were not aware of the possible dangers, nor of how to avoid them. Consequently, the trial judge, MacFarlane C.J.B.C., concluded:

> "I think it is the responsibility and the duty of the teacher in such cases... to see that the children under her care have acquired or have had a fair and reasonable opportunity to acquire a normal safe response to situations in which danger lurks before permitting them to play as she did here, without supervision. If the teacher fails in the exercise of that responsibility then I think she is liable for the results of that failure that she ought reasonably to have foreseen." (15)

(16)

Surprisingly, this decision was reversed on appeal. Although O'Halloran J.A. wrote a strong dissenting opinion in which he supported the judgment of MacFarlane C.J.B.C., Robertson J.A., for the majority, decided for the school board and the teacher, on the basis that the risk of injury was not sufficiently great as to warrant supervision.

> "While, as I have said, danger may eventuate in any game, and in that sense injury to one of the players might be foreseen, yet that danger is one of the risks of the game, which every parent knows goes with the game, and I would think the chances of any risk eventuating in a game of grass hockey played by children would be very slight. The possibility of danger emerging was only a mere possibility which would never occur to the mind of a reasonable man; and therefore there was no negligence." (17)

Robertson J.A. thus excuses the action of the teacher who provided no supervision. There seems to be no real dispute between the two Gard decisions as to the applicable principles. The underlying reason for the reversal is obviously that Robertson J.A. and Sidney Smith J.A. for the majority felt MacFarlane C.J.B.C. had overstated the risk.

(18)

The case of Hall v. Thompson raises the issue of a distinction between activities which are inherently dangerous, and activities which contain an element of danger. The infant plaintiff, aged nine, had been injured during a wrestling match sponsored by his school as part of an activity day. The evidence disclosed that a teacher was present to supervise, that the child had participated voluntarily, but that he had received no instruction as to wrestling holds. The court found the teacher not negligent on the basis that there was no evidence

to show that wrestling was itself an "inherently dangerous" activity.

> "It may, of course, be true that in all games or contests of skill involving the testing and development of physical strength accidents will happen, but it does not follow, in my opinion, that they should therefore be classed as inherently dangerous. The father stated in his evidence that he was willing that the boy should play football and baseball." (19)

This distinction between activities which are inherently dangerous and those which contain an element of danger arises in many of the cases. The importance of the distinction lies in the fact that a reduced level of supervision is permitted for an activity which contains an element of danger but is not inherently dangerous. This distinction was one of the factors underlying the Court of Appeal decision in the Gard case. Whether an activity, therefore, is (a) inherently dangerous, or (b) contains only an element of danger, is another of the factors which a court may consider. The actual pigeon-holing of a given activity into one classification or the other, however, may often prove to be very difficult.

The next major consideration of these issues in Canada did not occur for another fifteen years when, in 1967, the case of McKay v. Board of Govan School Unit No. 29 (20) worked its way up the judicial ladder into the Supreme Court of Canada. Here, a student, aged sixteen, suffered serious injury as the result of a fall from the parallel bars during a scheduled practise for a gymnastics display. A civil jury had found the teacher and the school board negligent and assessed damages.

On appeal to the Saskatchewan Court of Appeal, the court was

asked to rule that there had been a misdirection at trial when the trial judge instructed the jury that the duty of a teacher was that of a 'careful parent'. Woods, J.A., for the Court of Appeal, undertook a full, thoughtful examination of the nature of the duty of supervision. He contrasted a concept of general supervision with one of individual supervision. In the end, he concluded that there could not be one single test for the duty of supervision. The 'careful parent' test of Williams v. Eady, he stated, was well suited to situations in which a teacher was under a duty of general supervision. But in certain situations this duty became one of individual supervision, and a different standard then applied based on the skill and training of the instructor. On this point, Woods, J.A. commented:

> "A physical training instructor in directing or supervising an evolution or exercise is bound to exercise the skill and competence of an ordinarily competent instructor in the field. The standard of the careful parent does not fit a responsibility which demands special training and expertise." (21)

He then allowed the appeal in the following words:

> "The standard of the person possessed of special training or expertise may well be higher than that of the careful parent and it may well be that on applying it to the present facts a jury might arrive at the same result. This, however, is conjecture and therefore cannot be assumed. The standard of care put before the jury was inappropriate and confusing. It amounts to misdirection." (22)

The case was then further appealed by the injured plaintiff to the Supreme Court of Canada.(23) Ritchie J., for the court, expressed his suprise that Woods J.A. had ruled misdirection when the

standard of care he thought appropriate was actually more burdensome on the defendant than the one the jury had considered. In any event, Ritchie J. felt that the standard of the 'careful parent' was appropriate in the circumstances.

> "While I am not satisfied that this definition is of universal application, particularly in cases where a schoolmaster is required to instruct or supervise the activities of a great number of pupils at one time, I am nevertheless of the opinion that a small group, such as that which Molesky had in his charge in the improvised gymnasium is one to which Lord Esher's words do apply." (24)

Consequently, the verdict of the civil jury was restored.

The McKay case represented a new departure in the law affecting liability of teachers and school boards. It introduced the concept of a shifting standard of care and indicated the possibility that in some circumstances the teacher would have to exhibit even a higher standard of care than that of a 'careful parent'. Although Woods J.A.'s decision was overturned by the Supreme Court, there was no express finding that his standard of the "ordinarily competent instructor" was inappropriate. The Supreme Court was only saying that in the circumstances, it was proper for the trial judge to have directed the standard of the 'careful parent' to the jury. In fact, the Supreme Court recognized in its decision that the 'careful parent' test was not necessarily of "universal application". The door was thereby left open for new standards to be applied to the conduct of teachers.

Dziwenka v. The Queen and Mapplebeck,(25) is another Supreme Court of Canada case. The plaintiff, an eighteen-year old deaf mute,

was injured when his hand came in contact with an unguarded power saw. At the time, he was in a class of eight boys receiving instruction from the defendant teacher. The trial judge's finding that the defendant had been negligent was reversed on appeal. The Court of Appeal, taking a different view of the facts, stressed that the plaintiff was an intelligent boy who had had experience with the power equipment and was aware of the dangers involved in using the equipment. The Court could find no negligence on the part of the defendant who, it was proven, followed normal procedures in instructing and observing the plaintiff's use of the saw. In the circumstances, the court felt, he could not be expected to have foreseen that the plaintiff would injure himself in the manner he did.

The Court of Appeal decision was appealed to the Supreme Court where the trial judge's verdict was restored. Laskin J., for the Court, based his opinion largely on a different interpretation of the facts. Uppermost in his mind was the fact that it was the plaintiff's first such operation with a completely unguarded power saw, and that the plaintiff was the only person in the class at the time engaged in dangerous work. Although it is not stated expressly, the basis of Laskin J's decision appears to be that the instructor, in the circumstances, owed to the plaintiff a duty of individual supervision. By failing to do so, the instructor did not exercise the proper standard of care and consequentl, was negligent.

The Dziwenka case features a defence commonly raised by teachers when sued by students injured under their supervision - the defence of

'approved general practice'. If a defendant teacher can show that his actions conformed to an approved general practice followed by other teachers in similar situations, the teacher is in effect, prima facie not negligent. While the plea of 'approved general practice' can be an effective defence in many cases, it does not excuse all actions or inactions. Where the 'approved general practice' is clearly unreasonable in the circumstances, a teacher can still be found negligent. Nevertheless, where the defendant has satisfied the court that he performed his duty in accordance with an approved general practice, the plaintiff must discharge a heavier burden of proof in order to successfully make his case.

An example of a situation where there was a clear breach of the duty of supervision is found in the Moddejonge (26) case. The case arose from a tragic accident during a school outing when two girls were drowned. The defendant teacher was one of the supervisors of a field trip sponsored by the defendant school board. The accident occurred when a small group of the children persuaded the teacher to take them swimming in a conservation area. The swimming area consisted of a shallow region with a sharp drop-off into deep waters. There were no marker buoys indicating the drop-off point, but the teacher knew the limits and instructed the children accordingly. The teacher, however, could not swim, nor was any lifesaving equipment available nearby. While the children were in the water a breeze developed which created a surface current. One of the girls who could not swim was forced into the deep waters. As a result, she and another girl who attempted her rescue were drowned.

The judge cited Williams v. Eady in holding that the teacher's duty of supervision was that of a careful parent. He found the teacher negligent for having allowed a girl who could not swim to play in such an area. He should have foreseen the possibility, especially when the breeze developed, that one of the non-swimmers might be forced into the deep water area. In concluding his decision, the judge stated:

> "I take the view that there was a real risk that this girl, playing with a group her own age in water adjacent to a curved line of a fairly steep drop-off which was not marked, might inadvertently fall into danger and there was a duty to guard against that risk eventuating." (27)

A brief but interesting case is Moffat v. Dufferin County Board of Education.(28) The case is brief because the Court held that the action had been commenced too late according to the six-month limitation period contained in the Public Authorities Protection Act. The Court however did give some consideration to the liability issue and found a teacher not negligent where a thirteen-year old student sustained an injury while aiding a maintenance superintendent, at the teacher's request, in lifting a piano. The Court did feel that the maintenance supervisor had been negligent but that his actions, as well, came within the purview of the Public Authorities Protection Act. The case is interesting because it appears to be the only case in Canada where an attempt has been made to base liability on the actions of a school janitor. Presumably, if the action had been commenced within the prescribed time period, the school board would have been vicariously liable for his negligence.

The next consideration of these issues came in the very

important case of Thornton v. Board of School Trustees of School District No. 57.[29] The plaintiff, aged fifteen, was severly injured on gymnastics equipment during a physical education class. On the day of the accident, the instructor, it appeared, wanted to spend his time completing student report cards. Consequently, he offered his students a choice of sports, including gymnastics, and positioned himself so that he could observe their activities. The gymnasts obtained the equipment and then set about improvising a 'configuration' involving a springboard, a box-horse and foam mats. The object of the exercise was to have each gymnast jump from the boxhorse onto the springboard and then somersault in the air onto the mats. This activity occurred within sight of and to the knowledge of the instructor. Yet, the pupils had had only limited experience in gymnastics and had never before used this configuration. At one point, one of the gymnasts hurt himself after a somersault and brought this to the attention of the teacher. The teacher placed additional matting on the floor and allowed the activity to proceed. Shortly afterwards, the plaintiff sustained the injury which eventually left him paralyzed for life.

The court measured the actions of the teacher against two standards of care. The first was that of the 'reasonably competent instructor'. The second was that of the 'careful parent'. In respect to both these standards, the teacher was found to have been negligent. Andrews J. concluded this aspect of the case by stating:

> "Edamura's duty as a physical education instructor was to recognize the configuration as an inherently dangerous one. He was in breach of that duty when he permitted these youngsters to use it to perform manoeuvres when he knew, or ought to have known, there

> was considerable danger for novices somersaulting on that configuration. In any event it seems to me that Edamura failed in what might be described as a lesser duty of a careful parent not to foresee the risks of further injury once he learned of the injury to Karlson. ... He accordingly is liable." (30)

Both Thornton and McKay indicate that there is a real reluctance on the part of the courts to wholly abandon the 'careful parent' test in favour of a 'reasonably competent instructor' test. Thus, the two standards are applied coincidentally. The very fact that they can be applied coincidentally and both lead to the same result suggests that there is not much difference between them. Yet, both in McKay and in Thornton, the court seemed to assume that the 'reasonably competent instructor' test was a somewhat more strict standard of care. This is probably true, in the sense that a 'reasonably competent instructor', possessing a certain expertise, may be expected to foresee dangers which a careful parent might overlook. An explanation for the durability of the 'careful parent' test may lie in the fact that it is easy to apply in a wide variety of situations. Whereas a judge may often have difficulty in imagining what a 'reasonably competent instructor' would do in a given situation, he may find it simpler to relate to the role of a 'careful parent' to determine what action was reasonable.

Another recent case reveals the restlessness of the courts with the 'careful parent' test. In James v. River East School Division No. 9,(31) the plaintiff, an intelligent eighteen-year old Grade XII student, was seriously injured while performing a chemistry experiment.

The evidence disclosed that she had correctly followed both verbal and written instructions provided by the teacher but that these instructions had been defective. Although protective goggles were available, it was not mandatory to wear them and she chose not to.

Rather than basing negligence on the standard of a careful parent, both the trial court and the court of appeal[32] found that there was a duty on the part of the teacher to properly instruct. The teacher was obliged to be especially careful in his instructions because he knew the experiment to be dangerous and the possibility of an accident was foreseeable. Since the teacher had failed to instruct properly, he was negligent and the school board was vicariously liable.

Although it is only implied in the decision, it would appear that inherent in the 'duty to instruct properly' is a standard of care measured by the 'reasonably competent instructor' test. The issue is not explored fully in either the trial judgment or the court of appeal, but both decisions have the effect of moving the 'careful parent' test one step further away from 'universal application'.

In light of all these developments affecting the application of the 'careful parent' test, the most recent case, at time of writing, comes as a bit of an anti-climax. In Poulton v. Notre Dame College[33], the plaintiff, a resident student at the defendant school, contracted an infection following a hockey injury. When he requested the defendant teacher and residence supervisor that he be allowed to see a doctor, his request was refused. As a result the infection became much worse before any action was taken to provide him with medical care. The court ruled that the defendant teacher did not behave as would a careful parent, and

found him negligent.

If there were only one situation where a 'careful parent' test could be a useful analogy, then it would be in the case of injuries to resident students. In those cases, the school authorities stand veritably in loco parentis. The Poulton case, therefore, clearly represents a proper application of the test.

Summation of the Curriculum Cases

From this review of the 'curriculum' cases, there have emerged several factors which the courts seem to consider regularly in the course of making a decision. These factors are embodied in the following list of questions:

1. What was the plaintiff's age at the time of the accident?

   Generally, the older the plaintiff, the less supervision required.

2. How much instruction had the plaintiff received in the activity prior to the accident?

   Generally, the more instruction received, the less supervision required.

3. Was the plaintiff aware of the dangers? Did he participate voluntarily?

   If so, it can be argued that he accepted the risk inherent in the activity. An alert child will not need as much supervision as one who is slower mentally, or handicapped in some way. In any event, if participation is not voluntary, then careful supervision will be required.

4. What is the nature of the activity? Is it inherently dangerous, or does it contain only an element of danger?

   Where an activity is inherently dangerous, close supervision will be required.

5. Was the supervision of the activity conducted in accordance with an approved general practice?

   If so, it provides the teacher with a defence, provided that the approved general practice was reasonable in the circumstances.

6. What is the foreseeable risk of danger?

   This is an important consideration running throughout the cases. Where the foreseeable risk is small, but the danger is severe - e.g. a drowning, as in Moddejonge, a teacher will be expected to take extra precautions. This relationship between "risk" and "danger" was set forth by Laskin in the Dziwenka case, quoting in part from Fleming, Law of Torts:

   > The strictness with which a duty of care is regarded reflects the application of the ordinary law of negligence under which the standard of care to guard against unreasonable risk of injury must be assessed, in the particular circumstances, "by balancing the magnitude of the risk, in the light of an accident happening and the possible seriousness of its consequences, against the difficulty, expense or any other disadvantage of desisting from the venture or taking a particular precaution..." (34)

7. Has there been a previous occurrence of the accident or something akin to it of which the defendant is aware?

   A previous occurrence should put a supervisory authority on guard and he should take corrective action. Where a previous occurrence can be proven, the defendant will have difficulty avoiding liability.

These questions, then, comprise an approach to analyzing any set of facts in which a pupil may be suing a teacher and a school board. By answering each of the questions, it is possible to make an informal prediction of the results of any litigation. Similarly, the questions provide a guide for any teacher wishing to determine his own responsibility in a given situation. By taking into consideration

these factors, a teacher should be able to judge the amount of supervision expected of him. One caution, however, is in order. As the cases have demonstrated, there is some uncertainty about both the nature of the duty owed to a student and the standard of care required. Time alone will tell whether or not there is a separate duty of individual supervision, and whether the standard of the 'reasonably competent instructor' will attain greater usage. Until then, it is obviously best to err on the side of more supervision rather than less, so that the issue need never arise.

The Playground Cases

The second category of cases has been termed the "playground cases". These are the cases which arise from incidents occurring outside school hours or during recess usually in the playground area. Two major sets of issues exist as themes running throughout these cases.

The first theme involves issues relating to the duty of supervision. Many of the same factors listed in the previous section continue to apply, but new elements enter in as well. For instance, whereas in the curriculum cases it was the teacher who was invariably cast in the role of the supervisor, that is not always the case here. Instead, the supervisory responsibility may rest with a principal or with a school board directly. In addition, it is not simply a teacher's conduct which is being measured for adequacy. Often, the court will be concerned with a 'system of supervision' - the interaction of several persons responsible for supervising a large area.

The second set of issues is that involving the statutory and

common law duty of a school board to maintain and repair school premises and keep them safe for the use of the students. A typical example of this kind of statutory duty is found in S.146(7) of the Ontario Education Act.(35) This requires that every school board shall "keep the school buildings and premises in proper repair and in proper sanitary condition, provide suitable furniture and equipment and keep it in proper repair, and protect the property of the board". Yet, while the statute specifically sets out the fact that such a duty exists, it does not aid in stipulating the standard of care inherent in the duty. For this reason, and for this purpose, the courts have applied common law principles as well - notably, those associated with occupier's liability.

Although these two sets of issues are quite distinct and their development through the cases could each be considered separately, nevertheless, they are continually brought together within the same judgment. This is because there is an important interrelationship between the two, which, as the following discussion will attempt to show, also provides a broad, overall perspective on the duty of supervision.

The playground cases, in a sense, reflect the bureaucratic development of modern education. As the cases become more recent, the locus of supervisory authority tends to become further removed from the student. In the early cases, presumably involving small schools or one-room schoolhouses, the court is usually concerned with the actions of only one teacher. The judicial approach to these cases closely resembles the approach to the curriculum cases. Many of the same factors are weighed in the balance and the same principles are often relied upon to form the basis of a decision. Two early English cases help illustrate this point.

(36)

In Wray v. Essex County Council, the so-called "oil-can" case, the plaintiff was injured while moving between classes. As he turned a corner, he collided with another boy who was carrying an oil can on an errand for the schoolmaster. The spout of the oil can struck the plaintiff in the eye and he was badly hurt. The court was primarily concerned with whether the master had given the second boy sufficient instructions as to how he should carry the oil can. The court considered whether the oil can was an 'inherently dangerous' or a 'potentially dangerous' article. The standard of care expected of the schoolmaster would be greater if it were determined that the oil can was an inherently dangerous object. In commenting on the distinction, Lord Wright said:

> "Things like a naked sword or a hatchet or a loaded gun or an explosive are clearly inherently dangerous - that is to say, they cannot be handled without a serious risk. On the other hand, you have things in ordinary use which are only what is called "potentially dangerous", that is to say, if there is negligence or if there is some mischance or misadventure then the thing may be a source of danger, but the source of danger is something which is not essential to their ordinary character... This can does not come within the category of inherently dangerous articles." (37)

In the end, the Court held the master free of any negligence because the accident was "a misadventure which could not have been reasonably foreseen by anybody". (38)

(39)

In Rawsthorne v. Ottley et al., the plaintiff was one of several boys playing on a truck which was parked in the schoolyard delivering coal. As the truck was about to drive way, several of the

boys jumped on the back of it thereby causing the load carrier to tip upwards. The plaintiff was playing near the driver's cabin. Suddenly, the boys on the back of the truck released their grasp and the load carrier came down, crushing the plaintiff's leg. The court had to determine whether the schoolmaster was in breach of a duty to supervise the children in the playground. The evidence disclosed that the headmaster was aware that the boys were in the playground but was not aware that the truck had arrived to deliver the coal. The court found that the headmaster was not liable for any negligence on the basis that he could not reasonably have foreseen the accident occurring.

These cases, therefore, illustrate an application of two of the seven factors listed in the previous section. The court is concerned with what is reasonably foreseeable to the mind of the supervisory authority. Similarly, the court is engaged in an 'inherently dangerous, potentially dangerous' classification process - except that with this category of cases it is classifying an object or article rather than an activity. Nevertheless, the purpose of the classification process remains the same - to determine in the circumstances whether a higher degree of care is warranted.

An examination of some of the earlier Canadian cases illustrates application of more of these seven factors. In the Boivin (40) case, a child was injured after she fell from a horizontal ladder attached to the ceiling of a basement in the school. The school board had installed the ladder as sports equipment, but had not supplied mats along with it. The court refused to find the board negligent in not providing mats because evidence disclosed that it was not customary in the area for schools with

similar apparatus to supply mats. Also, despite twelve years of use, only two accidents had ever been reported to the defendant.

In the Koch[41] case, the plaintiff was a twelve-year-old boy who was hurt when he jumped from a woodshed located on school grounds into a snow drift. The accident occurred just after the teacher had rung the bell to open school for the day. The court found no negligence on the part of the teacher. The boy was old enough to appreciate the danger, and inasmuch as he had previously been warned about climbing and jumping off the buildings, he accepted the risk in doing so. Furthermore, the teacher was properly attending to her duties by opening the school and attending to the younger children.

In these two cases, consequently, the factors designated as 'customary practice', 'prior occurrence' and 'voluntary assumption of risk' all weighed heavily in the mind of the court.

A case which is roughly similar to Koch is Scoffield v. Public School Board of Section 20, North York[42]. The infant plaintiff was injured when she fell off a toboggan while descending a hill in the playground. The accident occurred in the morning just prior to school opening for the day's classes. Once again, the court found no negligence on the part of the school board or the teacher. The teacher was properly in her classroom at the time as required by school board regulations. As to the duty of supervision, the court stated, citing a British precedent, Langham v. Governors of Wellingborough School[43], that "it cannot be said that there is an absolute duty never to leave children without supervision"[44]. In other words, there was no duty to provide

the plaintiff with supervision at the time she was injured.

The application of the Langham principle in the Scoffield case marks an initial departure from the pattern set in the curriculum cases. Whereas some form of supervision was always required during classroom hours, the playground cases reveal that there are apparently circumstances and times when no supervision is required at all. The question then becomes - in what circumstances? at what times?

The Pook[45] case is the first clear example where a school board is found negligent for failing to keep its premises in repair. Jack Pook was playing or scuffling on school premises during a period of recreation and was pushed or fell onto loose rocks which lay upon the ground. As a result, Jack broke his leg. The Court considered S.89(c) of the Public Schools Act in Ontario[46] which placed a Board of Trustees under a statutory duty "to build, repair, furnish and keep in order the schoolhouses, furniture, fences and all other school property...". The court was specially influenced by the fact that "not one witness on behalf of the defendants has been able to tell the Court of one single act done in the way of clearing stones, brickbats, rubble, etc. from the school grounds in order to comply with the law".[47] As a consequence, the school board was found liable for breach of its statutory duty.

The judge in Pook relied heavily for support on the old English case of Ching v. Surrey County Council.[48] This case held that where a student sustained injury in a fall caused by his foot being caught in a hole in asphalt pavement on school grounds, the county council was liable because it was under a statutory duty to keep the school premises in a

good state of repair.

Although in both Ching and Pook a judge finds a school board in breach of its statutory duty, it is never clear what standard of care is being applied to the board's action. This standard is hinted at in Pook when MacKay J. states that the danger was "a hidden danger having regard to the mental developments and capacity of children of tender years."(49) This is the language of invitor-invitee relations in the law of occupier's liability.

But this does not resolve the question of what standard of care should apply. The answer to this question is confused because the nature of the relationship between a student and the school is confused. On the one hand a student is considered an invitee entitled to that standard of care expected of invitors. On the other hand, a student is something more than an invitee by virtue of the fact that, if under sixteen years of age, his presence on the premises is compelled by statute. This argument was stated by King J. in Lamarche v. L'Original Separate School Trustees:

> "It should be remembered that school children are not merely permitted, or invited, to come to school, but are required to do so, and, as members of the public, if they are injured by neglect of a statutory duty with regard to a place where they are expected to play, they are entitled to make those upon whom the statute has imposed the duty, responsible for injuries sustained by them through breach of such duty."
> (50)

The duty upon the school board, explains King J., "is to see that the premises provided for the accommodation of the school children are as safe as reasonable care and skill can make them." (51)

This debate continues throughout those cases where a plaintiff seeks to establish liability on the basis of a school board's neglect of its statutory duty or its duty as occupier.

The Ellis (52) decision is one of those where the duty of supervision and the issue of occupier's liability become intertwined. The plaintiff suffered injuries when a pulley attached to a school wall by a contractor doing repair work fell while students swung from the ropes below. The accident occurred during recess. The judge considered and then declared inapplicable the principles of invitor and invitee. Instead he decided that the principal of the school was under a duty of supervision with respect to the students and hence a higher standard of care was required.

> "In this case it seems to me that in view of the duty of supervision which the law imposes upon school authorities more specific care is demanded of them than that which is ordinarily required from premises in respect of invitees thereon." (53)

As such, the principal was negligent. He knew of the repairs and that the pulleys would constitute an enticement to the boys. He gave only oral warnings and did not send anyone to make sure the

warnings were heeded. The judge concluded that "the supervision exercised by the principal ... was in regard to the infant plaintiff, as he ought to have anticipated, wholly inadequate to save him from possible dangers."(54)

Although the application of the careful parent test to principals and school boards directly responsible for supervision seems even less appropriate than it does in relation to teachers, the courts continue to apply it throughout these cases. There is no attempt to base the standard of care on a more functional principle of, for instance, a "reasonably prudent principal". Instead, the courts seem content, implicitly or explicitly, to apply the careful parent test whenever a duty of supervision exists, no matter who or what exercises it.

The case of Adams v. Board of School Commissioners for the City of Halifax(55) is one instance where the adequacy of this test was raised as an issue. The plaintiff lost an eye as a result of a stone-throwing fight which broke out at recess. Only one teacher was on duty at the time and she was occupied in breaking up another fight. There was evidence to suggest that stone throwing incidents had occurred previously but never on such a mass scale as the one that day. The judgement of the court in this case was to set aside the verdict of a civil jury on the basis that the jury had been improperly instructed by the trial judge. The majority of three judges, while giving no indication of whether or not they felt the

supervision had been adequate, did hold that the 'careful parent' test was the proper standard of care to apply in the circumstances and ordered a new trial. The other two judges, dissenting, felt the plaintiff's action should be dismissed outright. They were concerned that a school board should not be held to a duty of continuous supervision such that it might be responsible for any and every accident which occurred in the schoolyard. This, they felt, would be too onerous a duty. The principal could not be found negligent because the system of supervision had functioned effectively for many years and was generally the system adopted in other schools. Similarly, the teacher, who was otherwise occupied, could not be held negligent. In this way, the judges of the minority were reticent to apply the 'careful parent' test in the circumstances for fear of placing school boards and principals under an unreasonably heavy burden.

In 1959, two important cases came before the courts. The Supreme Court of Canada, in the Board of Education for the City of Toronto v. Higgs,(56) considered a situation where the plaintiff was injured during rough play in the schoolyard at recess. One of the plaintiff's allegations was that the school board was in breach of its duty of supervision by failing to have a sufficient number of teachers on supervision at the time. The Court could detect no negligence on the part of any individual supervisor so it examined the adequacy of the overall system of supervision which the principal

of the school had established. The evidence disclosed that the system had been in effect for four years without any previous accidents. Also, echoing the Langham principle, the Court was of the opinion that it was not the duty of the school authorities to maintain supervision of all the students at every moment. The system of supervision was, consequently, judged adequate and the principal and school board were found not negligent.

The second case was Schade v. Winnipeg School District No. 1 and Ducharme.(57) The case concerned a student who had been injured on school premises during a pick-up baseball game at lunch break when he tripped over a stake on part of the grounds where a construction crew had been working. The court considered the duty of the school board and the principal both in respect of the duty to supervise and the duty as occupier. The court, as in the Ellis case, was of the opinion that the duty of supervision placed a school board under a higher standard of care than that which would apply were it merely under a duty as occupier. However, the court did feel that the ordinary relationship between a student on school premises and the school authorities was that of invitee and invitor. Only in certain circumstances does the duty of supervision come into effect with the attendant higher standard of care. The court felt that on the facts in this case a duty of supervision did not exist. Its decision on this point was based on certain rules and regulations

as well as the fact that the plaintiff had been warned not to play in the area. Instead, the court based its decision on the principles of occupier's liability. It noted that the stake was clearly visible and that the plaintiff had been, in effect, a trespasser on those parts of the grounds wehre the construction was taking place. Thus, neither the school board nor the school principal were negligent.

The Schade case is useful for what it illustrates about the relationship between the duty of supervision and the duty of occupier. In general, a school authority will always owe a duty to its students as occupier. Only in certain circumstances does it owe, or will be held liable, according to the more stringent duty of supervision. The cases discussed so far provide some clues for determining when a duty of supervision can be said to exist in the playground. In the absence of rules and regulations to the contrary, there appears to be no duty of supervision on the part of school boards and principals outside of school hours. This would seem to include lunch break as well. There is a duty of supervision during recess, however, and the higher standard of care would then apply. The fact that the accident in Schade occurred during lunch break and the Ellis accident during recess would seem to be the prime distinguishing feature between these two cases - so similar in facts but so completely different in result.

Durham v. North Oxford Public School Board (58) is a case involving an accident arising outside school hours. Consequently, no question of the duty of supervision ever arose. The plaintiff, a ten-year-old schoolboy,

was playing with a piece of wire which he had picked up in the school yard and stuck himself in the eye with it. The court held that the wire was potentially dangerous rather than inherently dangerous and that the accident was strictly misadventure. Consequently, the defendant school authority was free of any negligence. The case is interesting because, once again, a court expresses some dissatisfaction with the invitor-invitee standard of care. It inquires, without answering its own question, whether the compulsory nature of the student's presence on the premises does not place the school board under a "duty to have the premises as safe as reasonable care and skill could make them".[59]

This specific issue was considered by the court in the case of Portelance v. Board of Trustees of R.C. Separate School, S.S. No. 5 in Township of Grantham.[60] Some students were injured during the noon-hour when in the course of a game of tag, they ran into some bushes and were cut by thorns. The court decided the case on the basis of principles of occupier's liability. It held that the duty owed by the school board to the students was that of an invitor to an invitee and that the higher standard of care mentioned in Durham did not apply. Since the boys were aware of the existence of the thorn bushes, the danger was not unusual nor hidden from them. Consequently, the school board was not liable. The court did, however, seem to consider that simultaneously the school board was under a duty of supervision. It found no breach of this duty on the basis that it was not the teacher's duty to keep students under supervision at every moment. This statement, once again an echo of the

principle in Langham, is tantamount to saying that no duty of supervision existed at all. It would be less confusing if the court had simply taken the approach in Schade and decided that since the accident occurred outside school hours, the duty of supervision did not apply. Perhaps, in some situations, a duty of supervision would exist during noon-hour - particularly where the students customarily eat lunch and stay at the school. This may be a distinguishing feature between Portlance and Schade; however, it does not emerge from the case reports.

The case of Sombach v. Trustees of Regina Roman Catholi Separate High School Distr of Saskatchewan[61] is another "after-hours" case. The plaintiff was injured when she ran through a glass panel having mistaken it for an open doorway. Although a teacher stood nearby, the court found that no duty of supervision existed and went on to decide the case on the basis of the duty owed by an invitor to an invitee. The court found the school board negligent because, notwithstanding the familiarity of the child with the doorway, the glass door still constituted an unusual danger in light of her age - fourteen years old.

The most recent two cases in this fact category involve attempts to extend the scope of the duty of supervision. In Mattinson v. Wonnacott[62] the infant plaintiff, a kindergarten child, was severely injured when hit by a car. Normally, the child would arrive home by bus transportation provided by the school board. On this day, there was some confusion at a dropping-off point on the route, and the infant wandered off the bus at the wrong location. He was hit by a car while proceeding towards his home.

The court found that where the school board provided bus transportation to students after school hours, the duty of supervision extended beyond the school hours until a point in time when the child had reached his destination. Thus, in the case of a child of five years of age, the board and its agents were expected to insure that each child got off the bus at the proper location. Because this had not been done, the school board and the agent were both negligent.

Finally, in the most recent case, Magnussen v. Board of Nipawin School Unit No. 61 (63), the plaintiff was injured at recess when he, along with some other boys, strayed from the school premises onto an adjoining fair ground. In the course of their activities, the plaintiff was accidently injured by a piece of broken glass thrown by one of the other boys. The court found that the school board was not an occupier of the lands upon which the accident occurred so it could not be held negligent as an occupier. However, the question still remained as to whether the school board was liable with respect to its duty of supervision. The court decided that the resolution of this issue, in turn, depended upon a characterization of the articles in the adjoining fairground. Hall, J.A. stated:

> "I am prepared to concede to the appellant that if there was on the adjoining fairgrounds something which was essentially dangerous in itself, the finding that there was adequate supervision could be seriously questioned." (64)

However, the court held that the broken glass was only potentially dangerous. As such, the board was not under a duty to prevent the students from playing in the area in fulfillment of its duty of supervision.

Once again, the court turns to the 'careful parent' test to resolve the issue:

> "It is not reasonable to expect that a careful parent would forbid or prevent a child of 14 years from visiting or frequenting a place such as the fairgrounds ... merely because there might be broken glass of some sort in the area." (65)

It is now eighty-five years since Williams v. Eady. The school system has changed drastically since that time - the legal concepts applied to the school system have not changed.

Summation of the Playground Cases

Earlier, in relation to the discussion of the 'curriculum' cases, seven factors were listed which seem to influence a court when determining whether or not a duty of supervision has been breached. A review of the 'playground' cases reveals that these seven factors continue to heavily influence a court, even though the type of factual situation is somewhat varied. Consequently, a teacher - no matter what role or activity he finds himself placed in - may estimate the level of his own duty in the eyes of the law by looking to:

(1) the age of the student or students;

(2) the nature of the activity;

(3) the amount of instruction received by the student;

(4) the student's general awareness;

(5) the approved general practice;

(6) the foreseeable risk of danger;

(7) previous accidents in similar circumstances.

The playground cases reveal that a teacher will not constantly be placed under a duty of supervision. Before and after school hours and during lunchtime, the duty of supervision will not usually be owed to a student. This does not mean that no duty whatever is owed to a student on school premises at these times when the duty of supervision is not present. Instead, the school authority owes a duty as occupier to the student to keep the premises clear of hidden dangers. Similarly, the school authority will probably be subject to a statutory duty to keep premises and property in a state of fit repair.

Although there is some controversy over the precise definition of the standard of care, it seems generally accepted that the standard of care which inheres in the duty of an occupier is less than that which relates to the duty of supervision. Nevertheless, the occupier's duty can be a basis for liability upon which a school board may be found negligent and as a result be assessed for heavy damages. The point to keep in mind, as illustrated in the playground cases, is that once a student sets foot on school premises, the school board is potentially liable for injury suffered by him.

The playground cases and the curriculum cases, therefore, offer up certain conclusions. The question posed at the outset of this paper concerned the dimensions of liability. In order to determine these dimensions, both sets of cases must be considered in conjunction with one another, thereby forming a seamless web of case law on the issue of legal liability of teachers and school boards.

GENERAL CONCLUSIONS - THE DIMENSIONS OF LIABILITY

The dimensions of liability can only be sketched - to draw definitive lines is impossible. These dimensions may expand or contract with each successive court decision. Within a wide area, we may be certain that potential liability exists. On the fringes of that area, that very question of whether liability exists will be in issue.

The duty of occupier is best described in spatial terms. It applies to school premises as a duty owed by a school authority to students on school premises. Where the school authority is under a statutory duty to maintain and repair, the duty to students is extended to all forms of school property. The cases seem to suggest that the line which circumscribes the premises also circumscribes the duty. Nevertheless, it is possible to conceive of situations where school property (e.g. defective school equipment) used away from school premises may cause injury. In such a situation, the school board may be found in breach of its statutory duty to maintain school premises and property in repair.

In the usual circumstances, however, the spatial extension of a school board's potential liability beyond school premises is based upon the duty of supervision. Thus, in Mattinson, the board was liable where the accident occurred far away from school premises. Similarly, in Magnussen, the court assumed that the board could be found liable although the accident occurred beyond school premises. A common situation where a school authority may be held responsible for accidents off school premises

occurs whenever a school sponsors a field trip. The Moddejonge case arises from such a situation. The extension of the board's authority over the student as well as its potential liability may often seem to be based upon a consent agreement between the school and the parent. Yet, one wonders at the true legal effect of these parental consents.

If a school board were to authorize a field trip without obtaining parental consents, it would not be absolved from a duty of supervision. Similarly, it is not likely that a school board could exculpate itself from liability where it would normally be in a supervisory position. This is mainly because the treatment by the courts of exculpatory clauses in other contexts (specifically, commercial law) has been hostile and can only be expected to be more so where children are the injured parties. Probably, the only real effect that a parental consent has, is to remove the possibility of a school authority being found responsible for criminal negligence should an accident occur.

When analyzing a school trip situation, it is important to examine the aspect of consent, not only because of possible board liability, but also to see that the board itself has sanctioned the outing. If the board had not given its approval, then the teacher involved would probably not be operating within his scope of authority and the school board would not be vicariously liable. The teacher himself, however, would still be under a duty of supervision and could be judged personally liable should injury occur.

The duty of supervision, unlike the occupier's duty, is not spatially restricted. This is due to the nature of the duty which seems

to arise from a trust relationship between the teacher or principal and the parent. The relationship need not necessarily be viewed in terms of 'in loco parentis'. It is enough to say that there is a general understanding within the school system as it exists today that when a parent sends his child to a school, the school authorities will 'look after' that child. The duty of supervision, therefore, is temporally bound - restricted to set periods of time by implicit or explicit agreement between school authorities and parents. The boundary lines will vary with the evidence produced in each case. If a school has sent a notice to parents requesting that students be at school early on a particular day, then arguably the duty of supervision would commence earlier. When a student is given a detention, the school is not only inconveniencing the student but is probably also extending its duty of supervision.

The level of the duty and the inherent standard of care imposed on school boards and teachers has been discussed at length. The judicial debate over the suitability of the 'careful parent' test and the 'invitor-invitee' test is unlikely to be solved in the near future. It is important to realize, however, that these debates are on the scale of skirmishes rather than battles. Both the 'careful parent' test and the 'invitor-invitee' test seem well entrenched in the case law. Although some judges may occasionally express dissatisfaction with these concepts, there is no clear indication that any substitutes are likely to come into general usage.

Space, time, depth - these dimensions comprise and constitute

the dimensions of liability. But as in scientific measurement, so in this particular area of law, one wonders whether there is not perhaps a hidden fourth dimension - an important additional variable which when given its due consideration, may alter some of our perceptions about the existing state of the law. If there is such a fourth dimension, we suggest that it is the dimension of age.

EPILOGUE: THE FOURTH DIMENSION - AGE

With only one exception, the cases considered in this paper have dealt with injuries to youth or children. This simultaneously reflects and encourages a presumption in the law that school boards and teachers owe a duty only to children. The durability of the careful parent test over the years indicates the strength of this presumption.

Yet, as demonstrated by the James case, adults in educational institutions are not beyond the protection of the law. The duties under which educational authorities are placed do not cease with the attainment of a certain age by the student. The scope of the duty may be reduced where students are older and more mature - but, it is not eliminated. The school authority's liability as occupier will always exist towards those present on school premises, no matter of what age they may be. Arguably, the school board and teacher may also owe a duty of supervision to adult students as well. A dangerous chemistry experiment or gymnastics exercise will always require proper supervision to insure that the student is not injured. The fact that a student was

eighteen years of age or older may be a factor in determining how much supervision is required - it is not an absolute defence which a school authority can plead to exonerate itself of liability.

At present, not only the institution of higher learning but high schools as well are permeated with students eighteen years and over. If more actions were brought by these adult students against teachers and school boards for negligence, it is likely that the landscape of liability and the pattern of legal relationships would be transformed. There are three types of transformation which are likely to take place.

Firstly, the amount of damages awarded if a teacher and school board are found negligent is likely to be greater. Although there is some case law to the contrary, it is generally true that injuries to a bread-winning adult will receive more compensation than injuries to children.

Secondly, a 'conceptual' transformation will likely occur. Where adults are involved, the careful parent test is clearly not suitable. A new basis for the standard of care will be found to describe the duty owed to an adult student. The conceptual relics created from the presumption that the student was a child will be replaced by new workable concepts.

Thirdly, it is possible that court actions brought by adults against school boards may give rise to new forms of liability. Adults often attend educational institutions with concrete expectations. Their approach to the work is utilitarian and they often seek education as a means to an end. Consequently, they are likely to feel more aggrieved

if a course is taught poorly. Where a student's future plans or prospects are frustrated or damaged, this could possibly lead to a court action against a teacher and school board for malpractice. The door to such an action has already been cast slightly ajar in the James case in which the court discussed briefly a 'duty to instruct properly'.

While these transformations may occur at some point in the future, there is currently a virtual absence of case law in Canada pointing in new directions. Nevertheless, it is necessary to caution against any complacent view that a school board and teacher is released from its duty as occupier or supervisor when students attain a certain age. The prospects for liability could change drastically should a persistent adult successfully press a suit against a school board for physical, or even more dramatically, economic injury. School boards and teachers would then become accountable to students in new ways which could fundamentally affect the character and development of educational institutions in Canada.

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Footnotes

(1) Thornton v. Board of School Trustees of School District No. 57 (1975), 57 D.L.R. (3d) 38 438

The award was reduced on appeal to about $600,000.

(2) Fleming, The Law of Torts (2nd ed.), p. 2

(3) Fleming, op. cit., p. 116

(4) Williams v. Eady (1893) 10 T.L.R. 41

(5) Ibid, p. 42

(6) Fleming, op. cit., p. 322

(7) Indermaur v. Dames (1866) L.R. 1, C.P. 274

(8) Duncan v. Ladysmith School Trustees [1930] 3 W.W.R. 175

(9) Butterworth v. Collegiate Institute Board of Ottawa [1940] 3 D.L.R. 466

(10) Ibid, p. 472

(11) Ramsden v. Hamilton Board of Education [1942] 1 D.L.R. 770

(12) Ibid, p. 773

(13) Murray v. Belleville Board of Education [1943] O.W.N. 44 [1943] 1 D.L.R. 494

(14) Gard v. Board of School Trustees of Duncan [1946] 1 D.L.R. 352

(15) Ibid. p. 354

(16) Gard v. Board of School Trustees of Duncan [1946] 2 D.L.R. 456

(17) Ibid, p. 459

(18) Hall v. Thompson [1952] O.W.N. 133

(19) Ibid, p. 134

(20) McKay v. Board of Govan School Unit No. 29 (1967) 62 D.L.R. (2d) 503 (C.A.)

(21) Ibid, p. 512

(22) Ibid, p. 512

(23) McKay v. Board of Govan School Unit No. 29 (1968) 68 D.L.R. (2d) 519 (S.C.C.)

(24) Ibid, p. 523

(25) Dziwenka v. The Queen & Mapplebeck (1971) 1 W.W.R. 195

(26) Moddejonge v. Huron County Board of Education (1972) 2 O.R. 437

(27) Ibid, p. 443

(28) Moffat v. Dufferin County Board of Education (1973) 1 O.R. 351

(29) See footnote #1

(30) Ibid, p. 449

(31) James v. River East School Division No. 9 (1975) 58 D.L.R. (3d) 311 (Man.Q.B.)

(32) James v. River East School Division No. 9 (1976) 37 W.W.R. (2d) 577 (C.A.)

(33) Poulton v. Notre Dame College (1975) 60 D.L.R. (3d) 501

(34) Dziwenka, [1972] 1 W.W.R. 350 at 361 [S.C.C.]

(35) The Education Act, S.O. 1974, S. 146(7)

(36) Wray v. Essex County Council [1936] 3 All E.R. 97

(37) Ibid, p. 102

(38) Ibid, p. 102

(39) Rawsthorne v. Ottley [1937] 3 All E.R. 902

(40) Boivin v. Glenavon School District [1937] 2 W.W.R. 170

(41) Koch v. Stone Farm School District [1940] 2 D.L.R. 602

(42) Scoffield v. Public School Board of Section No. 20, North York [1942] O.W.N. 458

(43) Langham v. Governors of Wellingborough School (1932) 101 L.J.K.B. 513

(44) Ibid, p. 516

(45) Pook v. Ernesttown School Trustees [1944] O.R. 465

(46) Public Schools Act, R.S.O. 1970 C. 385

(47) Ibid, p. 467

(48) Ching v. Surrey County Council [1910] 1 K.B. 786

(49) Pook; footnote #44, p. 468

(50) Lamarche v. L'Original Separate School Trustees [1956] O.W.N. 686 at 688

(51) Ibid, p. 689

(52) Ellis v. Board of Trustees for Moose Jaw Public School District, [1946] 2 D.L.R. 697

(53) Ibid, p. 704

(54) Ibid, p. 707

(55) Adams v. Board of School Commissioners for the City of Halifax [1951] 2 D.L.R. 816

(56) Board of Education for the City of Toronto v. Higgs (1959) 22 D.L.R. (2d) 49

(57) Schade v. Winnipeg School District No. 1 and Ducharme (1959) 27 W.W.R. 546

(58) Durham v. North Oxford Public School Board [1960] O.R. 320

(59) Ibid, p. 327

(60) Portelance v. Board of Trustees of R.C. Separate School, No. 5, Township of Grantham [1962] O.R. 365, (1962), 32 D.L.R. (2d) 337

(61) Sombach v. Trustees of Regina Roman Catholic Separate High School District of Saskatchewan (1969) 72 W.W.R. 92

(62) Mattinson v. Wonnacott (1975) 59 D.L.R. (3d) 18

(63) Magnusson v. Board of Nipawin School Unit No. 61 (1975) 60 D.L.R. 572

(64) Ibid, p. 573

(65) Ibid, p. 574